**U.S. Department of Labor**

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**Issue Date: 29 November 2006**

*In the Matter of*:
**R.H.**[1]
Claimant

v. Case No.: 2005-BLA-05531

**ISLAND CREEK COAL COMPANY**
Employer

and

**DIRECTOR**, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

APPEARANCES:
Mary Z. Natkin, Esq.
For the Claimant

Ashley Harman, Esq.
For the Employer

BEFORE: DANIEL F. SOLOMON
Administrative Law Judge

# DECISION AND ORDER

***APPROVAL OF CLAIM***[2]

This matter involves a claim filed by Mr. R.H. for disability benefits under the Black Lung Benefits Act, Title 30, United States Code, Sections 901 to 945 ("the Act"), as implemented by 20 C.F.R. Parts 718 and 725. Benefits are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis, or to survivors of persons who die due to pneumoconiosis. Pneumoconiosis is a dust disease of the lung arising from coal mine employment and is commonly known as "black lung" disease.

[1] Effective August 1, 2006, the Department of Labor instituted a policy that decisions and orders in cases under the Black Lung Benefits Act which will be available on this Office's website shall not contain the claimant's name. Instead, the claimant's initials will be used.

[2] 20 C.F.R. § 725.477, 5 C.F.R. § 554-7 (Administrative Procedure Act), and also 20 C.F.R. § 725.479, Finality of decisions and orders.

## PROCEDURAL HISTORY

The miner filed an initial claim for benefits on January 7, 2002. (DX 2) On August 12, 2003, the District Director issued a Notice of Claim with a preliminary finding that the Claimant was entitled to benefits absent additional evidence. (DX 22) After the submission of additional evidence, the District Director issued another preliminary finding that the miner was entitled to benefits. (DX 40) A Proposed Decision and Order awarding benefits was issued on November 18, 2004. (DX 43) The Employer requested a formal hearing before an administrative law judge (ALJ). (DX 44) A hearing was held on June 1, 2006, in Beckley, West Virginia.

## APPLICABLE STANDARDS

Because the Claimant filed this application for benefits after March 31, 1980, the regulations set forth at part 718 apply. ***Saginaw Mining Co. v. Ferda***, 879 F.2d 198, 204, 12 B.L.R. 2-376 (6th Cir. 1989). This claim is governed by the law of the United States Court of Appeals for the Fourth Circuit, because the Claimant was last employed in the coal industry in the state of West Virginia within the territorial jurisdiction of that court. ***Shupe v. Director*, OWCP**, 12 B.L.R. 1-200 (1989) (en banc).[3]

This case represents an initial claim for benefits. To receive black lung disability benefits under the Act, a miner must prove that (1) he suffers from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) he is totally disabled, and (4) his total disability is caused by pneumoconiosis. ***Gee v. W.G. Moore and Sons***, 9 B.L.R. 1-4 (1986) (en banc); ***Baumgartner v. Director***, OWCP, 9 B.L.R. 1-65 (1986) (en banc). ***See Mullins Coal Co., Inc. of Virginia v. Director***, OWCP, 484 U.S. 135, 141, 11 B.L.R. 2-1 (1987). The failure to prove any requisite element precludes a finding of entitlement. ***Anderson v. Valley Camp of Utah, Inc.***, 12 B.L.R. 1-111 (1989); ***Perry v. Director***, OWCP, 9 B.L.R. 1-1 (1986) 1-1 (1986) (en banc).

## STIPULATIONS AND WITHDRAWAL OF ISSUES

1. The timeliness of the claim is no longer being contested.

Timeliness is a jurisdictional matter that can not be waived. 30 U.S.C. § 932(f), provides that "[a]ny claim for benefits by a miner under this section shall be filed within three years after whichever of the following occurs later": (1) a medical determination of total disability due to pneumoconiosis; or (2) March 1, 1978. The Secretary of Labor's implementing regulations at 20 C.F.R. § 725.308 sets forth in part, as follows:

(a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Act of 1977, whichever is later. There is no time limit on the filing of a claim by the survivor of a miner.

(c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, except as provided in paragraph (b) of this section, the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary

[3] The miner was last employed by Elk Creek Blue Eagle Mining Company and worked in Emmit, West Virginia. *See* pages 5-6 of telephone deposition of Claimant taken January 6, 2004.

circumstances.

I have reviewed all of the evidence in the record and no evidence exists to rebut the presumption.

## ISSUES

1. The Claimant's length of coal mine employment.
2. Whether the named employer is the responsible operator.
3. Whether the miner suffers from pneumoconiois.
4. If so, whether the miner's pneumoconiosis arose out of coal mine employment.
5. Whether the miner is totally disabled.
6. If so, whether the miner's disability is due to pneumoconiosis.
7. Whether the miner's most recent period of cumulative employment of not less than one year was with the named responsible operator.

## BURDEN OF PROOF

"Burden of proof," as used in this setting and under the Administrative Procedure Act[4] is that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." "Burden of proof" means burden of persuasion, not merely burden of production. 5 U.S.C. § 556(d).[5] The drafters of the APA used the term "burden of proof" to mean the burden of persuasion. ***Director, OWCP, Department of labor v. Greenwich Collieries [Ondecko]***, 512 U.S. 267, 18 B.L.R. 2A-1 (1994).[6]

A Claimant has the general burden of establishing entitlement and the initial burden of going forward with the evidence. The obligation is to persuade the trier of fact of the truth of a proposition, not simply the burden of production; the obligation to come forward with evidence to support a claim. Therefore, the Claimant cannot rely on the Director to gather evidence. The Claimant bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. ***Oggero v. Director, OWCP***, 7 B.L.R. 1-860 (1985).

## BACKGROUND

The Claimant is a 55-year-old male, married, with no dependants other than his spouse. The Claimant last worked in the coal mines in 1995. He filed a claim for benefits stating that he had difficulty breathing, could not engage in any activity that required exertion, and is currently on home oxygen. Throughout his career in the coal mines he has worked as an electrician and as a loader and operator. All of his work in the coal mines was underground. As an electrician, the

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[4] 33 U.S.C. § 919(d) ("[N]otwithstanding any other provisions of this chapter, ant hearing held under this chapter shall be conducted in accordance with [the APA]; 5 U.S.C. § 554(c)(2). Longshore and Harbors Workers' Compensation Act ("LHWCA") 33 U.S.C. § 901-950, is incorporated by reference into Part C of the Black Lung Act pursuant to 30 U.S.C. § 932(a).

[5] The Tenth and Eleventh Circuits held that the burden of persuasion is greater than the burden of production, ***Alabama By-Products Corp. v. Killingsworth***, 733 F.2d 1511, 6 B.L.R. 2-59 (11th Cir. 1984); ***Kaiser Steel Corp. v. Director***, OWCP [Sainz], 748 F.2d 1426, 7 B.L.R. 2-84 (10th Cir. 1984). These cases arose in the context where an interim presumption is triggered, and the burden of proof shifted from a Claimant to an employer/carrier.

[6] Also known as the risk of non-persuasion, *see* 9 J. Wigmore, Evidence § 2486 (J. Chadbourn rev. 1981).

Claimant states that he was required to carry a 50-75 pound tool bag several feet and carry heavy objects. He stopped working as a result of a rock fall that injured his back.

## MEDICAL EVIDENCE[7]

The following is a summary of the evidence of record:

Chest x-rays

| Date of X-Ray | Date of Reading | EXH. | Physician | Interpretation |
|---|---|---|---|---|
| 07/25/02 | 07/26/02 | DX10 | **Dr. Manu Patel B/BCR** | FQ 2; s/t; small opacities in all lung zones; bilateral lower zone peribronchial fibrosis. |
| 07/25/02 | 09/28/04 | CX10 | **Dr. Alexander B/BCR** | FQ 1; 1/2; q/t; positive for pneumoconiosis |
| 10/14/03 | 09/28/04 | CX4 | **Dr. Alexander B/BCR** | FQ 1; 1/1; q/t; positive for pneumoconiosis |
| 10/14/03 | 10/24/03 | EX3 | **Dr. Paul Wheeler B/BCR** | FQ 2; not completely negative; minimal interstitial fibrocystic infiltrates or fibrosis. Subtle thickening lateral portion. |
| 07/20/04 | 05/22/06 | CX9 | **Dr. Cappiello B/BCR** | Portable chest x-ray does not fulfill ILO standards for evaluation of black lung; not from a reasonable time period |
| 07/20/04 | 07/06/05 | EX7 | **Dr. Paul Wheeler B/BCR** | FQ 3; Mainly interstitial infiltrates or interstitial fibrosis lower lungs, possible subtle decreased upper lung markings/ check pfts for emphysema. |
| 12/15/04 | 02/27/06 | CX8 | **Dr. Cohen B-Reader** | FQ 1; q/t; 1/2; positive for opacities of pneumoconiosis |
| 12/15/04 | 01/29/05 | EX8 | **Dr. Christopher Meyer B/BCR** | FQ 1; no CWP |

Pulmonary Function Studies (Pre & Post Measurements)

| Date | EXH | Physician | HT | AGE | $FEV_1$ | FVC | $FEV_1$ /FVC | MVV | COOP |
|---|---|---|---|---|---|---|---|---|---|
| 07/25/02 | DX11 | **Dr. Rasmussen** | 64” | 51 | .92<br>.93 | 2.27<br>2.19 | 41%<br>42% | ------- | Good |
| 10/14/03 | EX12 | **Dr. Hippensteel** | 65” | 52 | .77<br>.83 | 1.60<br>1.68 | 48%<br>49% | ------- | Good |
| 12/15/04 | EX1 | **Dr. Zaldivar** | 64” | 53 | .93<br>1.0 | 2.36<br>2.49 | 39%<br>40% | ------- | Good |

[7] The Employer submitted several exhibits in excess of the limitations on evidence. 20 C.F.R. § 725.414 The Employer contests the constitutionality of these regulations as being in conflict with the Administrative Procedure Act. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). The exhibits, offered in excess of the limitations, will not be evaluated but have been marked for identification purposes and made part of the record in this case in order to preserve the issue for possible appellate review.

Blood-Gas Studies

| Date | EXH | Physician | Altitude | Resting(R) Exercise(E) | $pCO_2$ | $PO_2$ | Comments |
|---|---|---|---|---|---|---|---|
| 07/25/02 | DX11 | **Dr. Rasmussen** | | R | 47 | 56 | |
| 10/14/03 | EX12 | **Dr. Hippensteel** | | R | 46.8 | 52.4 | |
| 12/15/04 | EX1 | **Dr. Zaldivar** | | R | 47 | 65 | |

Exercise portion of studies could not be obtained due to the Claimant's back pain and inability to walk on the treadmill.

Medical Reports

| **Date of Exam** | **Date of Report** | **Physician/Facility** | **EXH.** |
|---|---|---|---|
| 12/19/05 | 12/19/05 | **Dr. Cohen** | CX1 |

The sum of the medical evidence in conjunction with this patient's work history indicates that this patient's 17 to 22 years of coal dust exposure and his 11.25 to 17.5 pack years of exposure to tobacco smoke are both significantly contributory to the development of his pulmonary dysfunction including severe obstruction and significant gas exchange abnormalities. His resulting respiratory impairment is clearly disabling for his last coalmine job as an underground electrician. The Claimant has severe obstructive lung disease which occurs in the presence or absence of CWP or negative chest x-rays. The respiratory symptoms of cough, wheezing, sputum production, and shortness of breath that the Claimant complains about, are related either to the duration of exposure or cumulative exposure to coal mine dust. The effect of exposure to coal mine dust is not trivial. There are no medical records to support Dr. Zaldivar's diagnosis of asthma. I believe he has chronic obstructive lung disease and based on the medical data, there is not a significant reversible component. There is no background history to support a diagnosis of asthma. Asthma cannot be diagnosed simply based on a history of childhood asthma or on symptoms alone. It must be corroborated from using pulmonary function tests. In conclusion, the miner's work history and significant exposure to coal mine dust and his smoking history are both contributory to the development of his pulmonary dysfunction including severe obstruction and significant gas exchange abnormalities.

04/25/06 04/25/06 **Dr. Radhakrishna Bellam** CX2

Based upon a review of the objective medical data as well as the medical reports and evaluations by Dr. Hippensteel and Dr. Zaldivar, Dr. Bellam concluded that Claimant's respiratory disability is caused at least in part by his exposure to and inhalation of coal mine dusts, and thus is pneumoconiosis. "I further conclude that this pneumoconiosis contributes significantly to his disability, which totally disables him from his coal mine employment." No medical evidence of asthma.

12/27/04 **Dr. George Zaldivar** EX1

He smoked for about 15 years, beginning in 1962 and quitting in 1977. He smoked about one pack a day. There is no evidence to justify CWP or any dust disease in the lungs. There is a pulmonary impairment, an obstruction, which is due to a combination of asthma and emphysema. The asthma is the main problem and I cannot discount the some degree of emphysema is present given that the smoking habit is so variable. From a pulmonary standpoint, the Claimant is unable to perform any work above the sedentary level. This is not the result of his occupation as a coal miner but a result of asthma and a possible admixture of emphysema from his smoking habit. Even a positive biopsy would be insignificant given the absence of readily seen reaction of the lungs to dust.

12/27/04 **Dr. Hippensteel** EX12

The Claimant has a smoking history of 9 years. He stopped smoking about 20 years ago. He now dips snuff. The Claimant does not have CWP, diagnosed with a reasonable degree of medical certainty. He has irregular interstitial markings which could relate to fluid congestion in his lungs. He has findings of severe airflow obstruction with a history of asthma and an unclear amount of smoking history that can both cause airflow obstruction in the absence

of CWP. This man appears to have some cardiac dysfunction. He does not have diffusion impairment from any lung condition. The findings do show that he is unable to go back to his previous job in the mines, but it is unrelated to his previous coal mine dust exposure with a reasonable degree of medical certainty.

## Other Medical Evidence

| Date of Report/Document | Physician/Facility | Type of Document/Report | EXH. |
|---|---|---|---|
| 11/2001 – 05/05/06 | **Community Health Foundation** | Treatment notes | CX5 |

Treatment for CWP, COPD, DBII, HTN, Hypoxemia, Polycythemia, and PUD.

| | | | |
|---|---|---|---|
| 05/21/02 – 05/25/02 & 7/20/04 – 7/22/04 | **Logan General Hospital** | Treatment notes | CX6 |

Claimant was admitted to Logan General Hospital on May 21, 2002 because of increasing shortness of breath, coughing with pain, smothering, congestion in the chest, and yellowish expectoration. Physical examination of his lungs revealed rales and ronchi. The clinical impressions of Dr. Pathorn Thacaradhara at the time of admission were possible community acquired pneumonia, chronic obstructive pulmonary disease with acute exacerbation, and possible coal workers' pneumoconiosis. An arterial blood gas study was performed on that date. Claimant's PH was 7.444, his $PCO^2$ was 42.1 and his PO2 was 61.4. An x-ray was also performed on that date which showed diffuse interstitial fibrotic type changes in the lower lungs. A follow up by CT scan was performed on May 23, 2002 which revealed multifocal

On July 2004, Claimant was admitted to Logan General because his oxygen saturation was determined to be in the low 80's. Emergency medical services was called to transport him to the ER because of a fear that he was suffering from congestive heart failure. He complained of cough with thick yellow sputum production, and pain on breathing. An x-ray showed that he had bilateral infiltrates in his lungs. Physical examination showed mild respiratory distress with ambulation and diminished breath sounds throughout with ronchi at the bases. Dr. Flanagan's impressions were respiratory failure, community acquired pneumonia, hypoxia, COPD, and coal workers' pneumoconiosis.

| Date of Report/Document | Physician/Facility | Type of Document/Report | EXH. |
|---|---|---|---|
| 11/21/03 | **Dr. Rasmussen** | Deposition | DX30 |

On Direct:
The miner worked in the coal mines from approximately 1971 to 1995. He worked at the surface of the mines for a number of years which would put him at a greater risk of exposure. He smoked between 1973 and 1982 at approximately 1 ½ packs a day. There is no diagnosis of chronic bronchitis because of a lack of chronic productive cough. There is no proof that asthma is caused by coal mine dust exposure, but the spirometry and blood gases are consistent with an asthmatic condition. The Claimant has normal diffusing capacity so it is not inconsistent with smoking induced lung disease that would be causing emphysema. There is no evidence of asthma in this Claimant, but there is a severe obstructive lung disease and the Claimant is susceptible to two contributory toxins as a result of his atopy; smoking and coal mine dust exposure. Coal mine dust exposure is a major contributing factor because of his prolonged exposure relative to his smoking history. The Claimant's pulmonary function tests were abnormal and indicative of coal mine induced lung disease. Coal mine dust can cause chronic obstructive lung disease but chronic obstructive lung disease is not associated with x-ray findings.

On Cross Examination:
The tests run by Dr. Hippensteel are identical to the ones run by Dr. Rasmussen. However, Dr. Rasmussen comes to a different conclusion regarding the existence of pneumoconiosis. Negative x-rays are not conclusive evidence of a lack of pneumoconiosis. Both asthma and coal mine dust exposure can cause airway obstruction. However, there is nothing in the Claimant's medical history to indicate that he has a history of asthma. The Claimant is simply highly

susceptible to toxins; in this case smoking and coal mine dust. The history of an absence of asthma would tend to preclude that asthma was responsible for his airway obstruction. The disagreement between Dr. Rasmussen and Dr. Hippensteel is the effect that coal mine dust had on the Claimant's respiratory disease.

05/30/06 **Dr. George Zaldivar** Deposition EX10

*On Direct:*
Claimant worked in the coal mines for 18 years and quit because of back problems. His last job was an electrician, and he had to do heavy lifting, pulling, and carrying. The miner started smoking at age 14 and quit smoking at 21. The smoking history is not significant itself but the age at which he smoked is because the lungs continue to develop at that time and the person later becomes more susceptible to chronic bronchitis and asthma. The Claimant was taking medications at the time of the examination; Theophylline and Spiriva, these types of medications are given for treatment of asthma. None of the x-rays I reviewed showed signs of CWP. Interstitial markings, bullae, and pleural thickening are not indicative of CWP. Bullae may be indicative of emphysema. The CT scans are more useful in the diagnosis of chronic lung disease than are chest x-rays. The CT scan of the Claimant shows no silicosis or simple CWP. But CWP may be present in the absence of radiographic evidence. Pulmonary tests revealed that the Claimant has severe airway obstruction. After bronchodilators, there is no improvement. However, there is no restriction because the total lung capacity is above what is predicted. Given the results of all of the tests, from a pulmonary and respiratory standpoint, the Claimant could not perform his last coal mine job. Because of the breathing test results, because of the family history, and the symptoms, the Claimant's diagnosis is one of asthma. The CT scans reveal the inflammation of the lungs not the destruction of the lungs so we are dealing with a problem of asthma. Coal dust exposure does not cause asthma or cause it to worsen. There is simply nothing in coal dust or silica dust that can produce asthma or cause it to worsen. Smoking may have contributed or caused asthma. The Claimant does not have legal pneumoconiosis.

*On Cross-Examination*
Portable x-rays do not conform to ILO classifications. Dr. Zaldivar relied on an article to cite the proposition that asthma, if left untreated, can cause irreversible obstruction. Dr. Zaldivar did agree that none of the physician's treated the Claimant for asthma, he was never hospitalized for asthma, and there are no previous medical records that indicate that the Claimant suffered from asthma. However, Dr. Zaldivar does question the absence of such records prior to the development of the record and presumes that a history of asthma must have existed which does not appear in the record. Dr. Zaldivar does not agree that smoking and coal mine dust are equal in causing COPD. However, he does concede that smoking and coal mine dust are independent causes of COPD and that the effects of smoking and coal mine dust are additive in cases of COPD.

05/30/06 **Dr. Hippensteel** Deposition EX11

*On Direct:*
Dr. Hippensteel was deposed and testified concerning his examination of the Claimant on October 14, 2003. Dr. Hippensteel's testimony and conclusions were also based on chest x-rays, pulmonary function tests, and other medical reports. Claimant complained of breathing problems. He denied any history of asthma. Claimant's wife raised chickens outside, but Claimant denied any involvement or participation. The Claimant smoked for 9 years before he stopped smoking 20 years prior to the date of this examination. However, Claimant had told others of a longer history of smoking; 15 years and quitting in 1977. His chest x-ray was not consistent with CWP but rather with some congestion in the lungs indicative of cardiac problems. The presence of s/t type opacities are not consistent with CWP. CT scan did not show CWP. Spirometry showed severe airflow obstruction post-bronchodilator. There was no diffusion impairment. The Claimant has severe respiratory impairment that would prevent him from going back to his last job in the coal mines. This is due to his history of smoking and airways disease. There is nothing to suggest it is due to CWP or "industrial bronchitis" as it subsides within a period of several months after leaving the mines. Dr. Cohen did not adequately take into account the Claimant's smoking history when diagnosing the Claimant with CWP.

*On Cross Examination:*
The Claimant does show signs suggesting asthma. However, there is no association between asthma and coal mine dust exposure. It is not a cause or a contributor. The miner does not have legal pneumoconiosis. Dr. Hippensteel

does not agree with DOL policy that smoking and coal mine dust are equal in causing COPD, but does agree that smoking and coal mine dust are independent causes of COPD. Rapid heart rate could be due to nervousness or anxiety.

| | | | |
|---|---|---|---|
| Date of CT Scan: 05/23/02<br>Date of Report: 07/01/05 | **Dr. Wheeler** | CT Scan | EX5 |

Small pleural effusions, 2.5 cm RLL due to emphysema. No silicosis, CWP.

| | | | |
|---|---|---|---|
| Date of CT Scan: 05/23/02<br>Date of Report: 07/06/05 | **Dr. William Scott** | CT Scan | EX6 |

Infiltrate posterior RUL compatible with pneumonia, no evidence of silicosis, CWP.

## DISCUSSION

### Length of Coal Mine Employment

The regulations provide a formula for establishing a miner's length of coal mine employment. First, 20 C.F.R. § 725.101(a) (32) indicates that "year" means a calendar year consisting of either 365 or 366 days, or partial periods totaling one year, during which a miner worked in and around a coal mine for at least 125 working (paid) days. If the miner worked at least 125 days in a calendar year, or "partial periods totaling one year", then he is given credit for one year of employment. 20 C.F.R § 725.101(a)(32)(i). However, if he worked fewer than 125 of coal mine employment days in a year, then he receives credit for only a fractional year based on the ratio of the number of days actually worked to 125 days, 20 C.F.R. § 725.101(a)(32)(i). Preferably, the actual length of coal mine employment will be determined based on the actual beginning and ending dates of all periods of coal mine employment to the extent permitted by the evidence. 20 C.F.R. § 752.101(a)(32)(ii). Such a calculation may be based on all credible evidence, including co-workers affadavits and sworn testimony. However, if the evidence is insufficient to establish the beginning and ending dates of the examiner's coal mine employment, then the regulations indicate that the miner's yearly income be divided by the coal industry's average daily earning for the year as reported by the Bureau of Labor Statistics ("BLS"), 20 C.F.R. § 725.101 (a) (32) (iii).

Mr. R.H. first started working in the coal mine industry in 1972 for the Wyoming Coal Mining Company. (DX5) The miner stopped working in the coal mine industry in 1998. (DX5) The evidence is not sufficient to establish beginning and ending dates for the entire length of the miner's coal mine employment. In addition, the miner did not work for a full calendar year during each of the years in which he was employed as a coal miner. Consequently, for those periods in which the miner did not work for a full calendar year or where a beginning and end date is not established, the regulations permit me to compute the miner's length of employment by dividing the miner's yearly income from work by the coal mine industry's average daily earnings for that year. *See* 20 C.F.R. §725.301(a)(32)(iii). A copy of the BLS table is listed below.

| Average Earnings of Employees in Coal Mining | | |
|---|---|---|
| **Year** | **Yearly (125 days)** | **Daily** |
| 1999 | $19,340.00 | $154.72 |
| 1998 | 19,160.00 | 153.28 |
| 1997 | 19,010.00 | 152.08 |
| 1996 | 18,740.00 | 149.92 |
| 1995 | 18,440.00 | 147.52 |
| 1994 | 17,760.00 | 142.08 |
| 1993 | 17,260.00 | 138.08 |
| 1992 | 17,200.00 | 137.60 |
| 1991 | 17,080.00 | 136.64 |
| 1990 | 16,710.00 | 133.68 |
| 1989 | 16,250.00 | 130.00 |
| 1988 | 15,940.00 | 127.52 |
| 1987 | 15,750.00 | 126.00 |
| 1986 | 15,390.00 | 123.12 |
| 1985 | 15,250.00 | 122.00 |
| 1984 | 14,800.00 | 118.40 |
| 1983 | 13,720.00 | 109.76 |
| 1982 | 12,698.75 | 101.59 |
| 1981 | 12,100.00 | 96.80 |
| 1980 | 10,927.50 | 87.42 |
| 1979 | 10,878.75 | 87.03 |
| 1978 | 10,038.75 | 80.31 |
| 1977 | 8,987.50 | 71.90 |
| 1976 | 8,008.75 | 64.07 |
| 1975 | 7,405.00 | 59.24 |
| 1974 | 6,080.00 | 48.64 |
| 1973 | 5,898.75 | 47.19 |
| 1972 | 5,576.25 | 44.61 |

The SSA record shows that the Claimant earned $408.00 in 1972 working for the Wyoming Coal Mining Company. (DX5) This figure divided by the average daily earnings as published in the BLS table yields a total of 9 working days.[8]

Next, the Claimant worked for the Island Creek Coal Company from 1974 to 1980 and then during 1996 and 1998. The Claimant's earnings as reported on the SSA report are sufficient

[8] $408 divided by $44.61 yields approximately 9 working days. The SSA record shows earnings for two quarters but does not list beginning and ending dates for those quarters, thus precluding an accurate assessment of the number of working days for the year. I did not credit the miner for any working days in 1973 because his annual income from coal mining was $34, less than the daily average for that year.

to credit the miner with seven years of coal mine employment from 1974 to 1980. (DX5) There are no beginning and ending dates given for the years 1978 to 1980, but the earnings are sufficient for each of those years such that when divided by the average daily earnings for the particular year, the result yields a figure greater than 125 days which is the number of days required in order to constitute a year of employment.

The miner's employment in 1981 with the F&J Coal Company, Shell-Ray mining, and ACB Mining amounted to a full year's employment. (DX5)

In 1982, the miner worked for Shell-Ray mining and earned $3481.50. The beginning and ending dates for the Claimant's employment are not given. Based on the BLS table, this yields 34 working days.

From 1984 to 1986, the miner worked for the Huff Company. Although no beginning and ending dates are given, the miner, in each of those years, earned sufficient income to qualify as a full calendar year of employment based on the BLS daily average earnings for 1984, 1985, and 1986.[9]

In 1987, the miner earned $12457.00 working for Shell-Ray Mining, Inc. and $3317.42 working for the Link Coal Company. This equates to 125 working days using the BLS daily average earnings figure. The miner worked a full year for Shell-Ray Mining in 1988.[10] In 1989, the miner earned $4786.88 from Shell-Ray Mining, Inc. and $10322.49 working for ARBM. (DX5) There are no beginning and end dates given for this period of employment. Using the BLS table and the formula for calculating number of working days, the miner can be credited with 115 working days of employment.

The miner worked for ARBM Coal Co. in 1990-1992 and earned over $40,000.00 in annual income for 1990, 1991, and 1992. He is credited with a full year of employment for each of those years.

In 1995, the miner worked for Elk Creek Blue Eagle Mining and earned $9659.92, crediting him with 66 days of coal mine employment. (DX5)

The miner also worked for Island Creek in 1996 and 1998, but there are no dates listed on the SSA report and the miner's income was significantly less than his prior income from Island Creek. In 1996 and 1998, the miner earned $3297.33 and $3680.92, respectively. Utilizing the formula and the BLS table this yields 22 and 24 working days for 1996 and 1998, respectively.

In determining the length of Mr. R.H.'s length of coal mine employment, I have considered his testimony, the coal mine employment form he completed, as well as the SSA earnings record submitted. Any one of these may be used exclusively to determine the Claimant's length of coal mine employment. *See generally* ***Harkey v. Alabama By-Products Corp.***, 7 B.L.R. 1-26 (1984); ***Bizarri v. Consolidation Coal Co.***, 7 B.L.R. 1-343 (1984); ***Coval v. Pike Coal Co.***, 7 B.L.R. 1-272 (1984); ***Gilliam v. G & O Coal Co.***, 7 B.L.R. 1-59 (1984); ***Tackett v. Director, OWCP***, 6 B.L.R. 1-839 (1984). Clearly, between 1974 to 1998, a period of 24 years, Mr. R.H. did work as a coal miner, although not consistently. As the SSA earnings record shows, Mr. R.H.'s employment as a coal miner was both sporadic and, in many years, limited, often varying significantly in the amount of income earned. Neither beginning nor ending dates of employment are given for many of the years reported on the SSA report. Consequently, the Bureau of Labor Statistics table along with the earnings of Claimant, as

[9] The miner earned $15930.38 in 1984, $28357.08 in 1985, and $21144.04 in 1986. (DX5)

[10] The miner earned $21416.45 in 1988 working for Shell-Ray Mining, Inc.

reported on the SSA statement, was utilized to determine the length of the Claimant's coal mine employment. I credit the miner with 16 years of coal mine employment.

**Designation of Responsible Operator**

Liability for payment of benefits to eligible miners and their survivors rests with the responsible operator or, if the responsible operator is unknown or is unable to pay benefits, liability is assessed against the Black Lung Disability Trust Fund. The operator which is liable is the one which most recently employed a claimant for a cumulative period of one year and which has not demonstrated an inability to pay benefits. 20 C.F.R. § 725.492(b)(2000) and 20 C.F.R. § 725.495(c)(2001). The designated responsible operator bears the burden of proving that it is not the potentially liable operator that most recently employed the miner. 20 C.F.R. § 725.495(c)(2) (2001).

Under the regulations applicable to this claim,[11] liability for black lung disability benefits under the Act is assessed against the most recent coal mine operator which meets the requirements set out in 20 C.F.R. §725.492 and 493.[12] As a result, in naming a responsible operator, DOL will start with the most recent employer and work backwards in time until it finds the first operator that meets the regulatory requirements. *See* ***Director, OWCP v. Trace Fork Coal Co. [Matney]***, 67 F.3d 503 (4th Cir. 1995) rev'g in part sub. nom., ***Matney v. Trace Fork Coal Co.***, 17 B.L.R. 1-145 (1993).

The employer must have operated a coal mine or other facility for any period after June 30, 1973 to be held liable for the payment of benefits, 20 C.F.R. § 725.492(a)(2) (2000) and 20 C.F.R. § 725.494(b) (2001). In addition, the miner's employment with the operator must include at least one working day after December 31, 1969. 20 C.F.R. §§ 725.492(a)(3) (2000) and 20 C.F.R. 725.494(d) (2001). Both of these requirements have been well established. The relevant requirements in this case are whether Island Creek is an operator, whether Mr. R.H. worked for Island Creek for one year or more and whether Island Creek is financially capable of assuming liability.

In determining whether a company is an operator, the Board has held that the test is whether the company has reserved to itself, under its contractual arrangements, powers which allow it to exercise supervision and control over the coal mine. The test is not whether the company, in fact, exercised such powers. ***Long v. Clearfield Bituminous Coal Corp.***, 1 B.L.R. 1-149 (1977).

On February 28, 2003, a Notice of Claim was sent to ARBM and Island Creek Coal Company by the Department of Labor, OWCP, designating them as potentially liable operators. (DX15) ARBM was listed as a coal mine operator as well as a contractor jointly with Island Creek/Consolidation Coal. Only Island Creek was found to be self-insured. The designated responsible operator bears the burden of proving that it is not the potentially liable operator. 20 C.F.R. § 725.495(c)(2) (2001). On July 7, 2003, Island Creek requested an extension of time for

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[11] New Black Lung regulations became effective in January 2001. However, the new provisions concerning responsible operator, 20 C.F.R. §§ 725.491 to 495 (2001), are not applicable to pending claims. See 20 C.F.R. § 725.2 (2001).

[12] Those conditions include (1) the operator operated a coal mine after June 30, 1973; (2) the miner worked at least one working day after December 31, 1969; and, (3) the operator is capable of assuming its liability for the payment of continuing benefits, through one of three specified means. 20 C.F.R. § 725.492 (a) (2) through (a) (4).

producing the contract between Island Creek and ARBM Mining relevant to the responsible operator/insurance carrier issues. (DX19) Island Creek concedes that a valid and legal contract was formed between ARBM and Island Creek/Consolidation Coal; however, Island Creek was unable to produce the contract. Island Creek maintains that its only rights retained under the contract pertained to the quality price and amount of coal and that Island Creek did not acquire rights of control or supervision over ARBM employees. (DX21) Island Creek's ability to produce evidence supporting its assertions would be sufficient to relive it of liability. Companies having only *de minimis* or sporadic contact with a mine or which merely provide incidental services to coal mines are not operators within the meaning of the Act. *See* ***Price v. Dresser Industries, Inc.***, 8 B.L.R. 1-179 (1985). Unable to put forth sufficient evidence to rebut the presumption of responsible operator designation, Island Creek has failed to meet its burden of proving that it is not the responsible operator. I find that Island Creek is the responsible operator.

According to 20 C.F.R.§ 725.493(a)(1), the necessary length of employment is a cumulative period of one year or more. A two-step inquiry has been developed to determine when that requisite condition has been satisfied. First, the miner must have worked for the operator for "a period of one year, or partial periods totaling one year." 20 C.F.R. §725.493 (b). If that requirement is satisfied, then it must be established that the miner worked regularly during his employment with the operator. To fulfill the requirement of working "regularly," subsection (b) imposes a minimum of 125 working days.[13] ***ARMCO, Inc. v. Martin***, 277 F.3d 468 (4th Cir. 2002). Therefore, for an operator to be held potentially liable under this section, the evidence must establish that the miner worked for at least a period of one calendar year, or partial periods totaling one year, including a showing that the miner worked 125 days during that period. In the event that a miner's employment history reveals multiple employers in the coal industry, the entity that most recently employed miner for "not less than 1 year" shall be considered the putative putative operator. 20 C.F.R. § 725.493(a)(4). Finally, the regulations state that the beginning and ending dates of employment with each coal mine operator should be identified "to the extent the evidence permits." 20 C.F.R. § 725.493(b).

Mr. R.H. worked for Island Creek for at least one year as documented from his social security earnings and recollection during testimony which establish his employment with Island Creek from 1974 to 1980, and then in 1996 and 1998. Additionally, Mr. R.H. has clearly met the one year requirement under 20 C.F.R. § 725.493 (a) based on Mr. R.H.'s length of employment with the company. *See* "Length of Employment" discussion, *supra*.

According to 20 C.F.R. § 725.492 (a) (4), which defines "responsible operator," a responsible operator must be capable of assuming its liability for the payment of benefits through one of three means: 1) an insurance policy; 2) self insurance; or, 3) sufficient assets available for the payment of benefits. Additionally, according to 20 C.F.R. § 725.492 (b), in "absence of evidence to the contrary, a showing that a business entity or corporation exists shall be deemed sufficient evidence of an operator's capability of assuming" its liability for black lung disability benefits.

[13] The 125 day rule to determine whether an operator may be held potentially liable relates only to identification of the proper responsible operator and not the actual length of a miner's employment for purposes of the entitlement presumptions. *Croucher v. Director, OWCP*, 20 B.L.R. 1067 (1996)(en banc).

I also observe that, at least in the Fourth Circuit Court of Appeals,[14] the Director bears the burden of developing a sufficient record that will permit the identification of the proper responsible operator. The BRB has also commented that because the Director is responsible for enforcing the provisions of the regulations regarding the ability to pay claims, he should investigate the measures a potential responsible operator took to ensure its ability to pay any possible Black Lung Act claims.[15]

According to the Regulations, an operator may be considered responsible for a claim if five criteria are met: (1) the miner's disability or death arose at least in part out of employment in or around the coal mine; (2) the operator was an operator for any period after June 30, 1973; (3) the miner was employed by the operator for a cumulative period of not less than one year; (4) the miner's employment with the operator included at least one working day after December31, 1969; and (5) the operator is capable of assuming its liability for the payment of benefits. 20 C.F.R. §725.494(a)-(e). It is the Director's position that Island Creek Coal Corp. meets these standards and therefore is the responsible operator.

**Last Year of Cumulative Employment**

Section 725.493(a)(1) provides that the operator or other employer with which the miner had the last recent cumulative employment of not less than one year shall be considered the responsible operator. Mr. R.H's last cumulative employment of not less than one year was with ZRBM, according to his social security records. The director identified ARBM as being owned and operated by Island Creek Coal Co. The Employer contests this finding. The Employer has not submitted evidence to support its contention that it was not the employer with whom Claimant spent his last year of cumulative employment. I find that Claimant's last period of cumulative employment of not less than one year was with the named designated responsible operator – Island Creek Coal Co.

**Existence of Pneumoconiosis**

Pneumoconiosis is defined as a chronic dust disease arising out of coal mine employment.[16] The regulatory definitions include both clinical (medical) pneumoconiosis, defined as diseases recognized by the medical community as pneumoconiosis, and legal pneumoconiosis, defined as any chronic lung disease. . .arising out of coal mine employment.[17] The regulation further indicates that a lung disease arising out of coal mine employment includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(b). As several courts have noted, the legal definition of pneumoconiosis is much broader than medical pneumoconiosis. ***Kline v. Director, OWCP***, 877 F.2d 1175 (3d Cir. 1989).

A living miner can demonstrate the presence of pneumoconiosis by: (1) chest x-rays interpreted as positive for the disease (§ 718.202(a)(1)); or (2) biopsy report (§ 718.202(a)(2)); or the presumptions described in Sections 718.304, 718.305, or 718.306, if found to be

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[14] *See Director, OWCP v. Trace Fork Coal Co. [Matney]*, 67 F.3d 503, 507 (4th Cir. 1995), rev'g in part sub nom., *Matney v. Trace Fork Coal Co.*, 17 B.L.R. 1-145 (1993).

[15] *See Matney v. Trace Fork Coal Co.*,17 B.L.R. 1-145, 1-149 (1993).

[16] 20 C.F.R § 718.201(a).

[17] 20 C.F.R. § 718.201(a)(1) and (2) (emphasis added).

applicable; or (4) a reasoned medical opinion which concluded the disease is present, if the opinion is based on objective medical evidence such as blood-gas studies, pulmonary function tests, physical examinations, and medical and work histories. (§ 718.202(a)(4)).

This case arises within the territorial jurisdiction of the Fourth Circuit. Thus, absent contrary evidence, while evidence relevant to any of the above categories may demonstrate the existence of pneumoconiosis, the adjudicator, in the final analysis, must weigh all of the evidence together in reaching a finding as to whether a miner has established that he has pneumoconiosis. ***Island Creek Coal Co. v. Compton***, 211 F.3d 203, 211, 22 B.L.R. 2-162 (4th Cir. 2000).

Since the record does not contain any evidence that Mr. R.H. has complicated pneumoconiosis, and he filed his claim after January 1, 1982, a regulatory presumption of pneumoconiosis is not applicable. Additionally, Mr. R.H. has not submitted a biopsy. As a result, Mr. R.H. will have to rely on chest x- rays or medical opinion to establish the presence of pneumoconiosis.

*X-ray Evidence*

The record I consider under the rules for limitations on evidence involves four readings of four x-rays. The Claimant relies on the two readings by Dr. Alexander of two separate x-rays, taken on July 25, 2002, and October 14, 2003. In rebuttal to the October 14, 2003 x-ray, the Employer submits a reading by Dr. Wheeler. The Employer submits two x-ray readings as part of its affirmative case: a reading by Dr. Wheeler of an x-ray taken on July 20, 2004, and a reading by Dr. Meyer of an x-ray taken on December 15, 2004. The Claimant has provided readings in rebuttal of both of these x-rays. The evidence also contains department sponsored reading by Dr. Patel of an x-ray taken on July 25, 2002.

Both of the x-rays submitted by the Claimant as part of its affirmative case were read as positive for pneumoconiosis; one with a profusion of 1/2 and another with a profusion of 1/1. The department sponsored reading by Dr. Patel found small opacities in all lung zones. The Employer's reading of the same x-rays were not completely negative but were read as not demonstrating the presence of CWP. Dr. Meyer read the December 15, 2004 x-ray as negative for CWP while the Claimant rebutted this with a positive reading by Dr. Cohen. The Claimant also proffered into evidence Dr. Capiello's interpretation of the July 20, 2004 x-ray. Dr. Capiello discredits the reading because the portable chest x-ray taken does not conform to ILO standards for evaluating black lung disease.

*Biopsy and Presumption*

Claimant has not established pneumoconiosis by the provisions of subsection 718.202(a)(2) since no biopsy evidence has been submitted into evidence.

*Medical Reports*

20 C.F.R. § 718.202(a)(4) sets forth:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in Section 718.201. Any such finding shall be based on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical

performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

After reviewing the objective medical evidence and the various medical reports submitted by both sides, Dr. Hippensteel and Dr. Zaldivar saw no justification for the diagnosis of CWP. The Claimant has severe airflow obstruction, they concluded, but this is due to the Claimant's history of asthma and smoking. Both doctors diagnosed the Claimant with asthma and suggested that no evidence exists to indicate the presence of a dust related lung disease.

Drs. Bellam and Cohen concluded that the miner suffered from pneumoconiosis. Dr. Cohen stated that the miner showed severe obstructive lung disease which can occur in the presence or absence of CWP. The miner's significant exposure to coal mine dust as well as his smoking history, Dr. Cohen opined, were both significant contributory factors in causing pneumoconiosis.

*Testimony*

A physician who prepared a medical report, admitted under § 725.414, may testify with respect to the claim. 20 C.F.R. § 725.414(c). The Employer has submitted the deposition of Dr. Hippensteel, who prepared a medical report offered by the Employer as part of its case in chief. (EX 8)

In deposition, Dr. Zaldivar stated that there is no pneumoconiosis because interstitial markings, bullae, and pleural thickening are not indicative of CWP. Because of the breathing test results, because of the family history, and the symptoms, the Claimant's diagnosis is one of asthma. This is apparent because there is an inflammation of the lung not destruction. Coal dust exposure does not cause asthma or cause it to worsen. There is simply nothing in coal dust or silica dust that can produce asthma or cause it to worsen. Smoking may have caused or contributed to the asthma. On cross examination Dr. Zaldivar stated that he does not agree that smoking and coal mine dust are equal in causing COPD. He does agree; however, that smoking and coal mine dust are independent causes of COPD and that the effects of each are additive.

Dr. Hippensteel, in his deposition, stated that the Claimant has severe respiratory impairment. Dr. Hippensteel attributed this to the Claimant's history of smoking and airways disease. There is nothing to suggest it is due to CWP or "industrial bronchitis". Industrial bronchitis subsides within a period of several months after leaving the mines. Because the miner last worked in the coal mines many years ago there would not be an expectation of industrial bronchitis. Dr Hippensteel added that the Claimant does show signs of asthma. However, there is no association between asthma and coal mine dust exposure. It is not a cause or a contributor according to Dr. Hippensteel.

*Other Medical Evidence*

The record contains other medical evidence submitted by the Employer and the Claimant. The Employer puts forth two readings of a CT scan taken on May 23, 2002. The readings are by Dr. Wheeler and Dr. Scott. Both readings are negative for CWP.

The Claimant offers treatment notes from two medical facilities the Claimant was seen at. The Claimant was admitted to Logan General Hospital and Community Health Foundation for symptoms related to shortness of breath. Both facilities, in the course of treating the Claimant, diagnosed the Claimant with CWP and COPD, as well as other respiratory ailments.

*Rationale*

The existence of pneumoconiosis is based on weighing all types of evidence under 20 C.F.R. § 718.202 together. The presence of pneumoconiosis is based on weighing all types of evidence under 20 C.F.R. § 718.202 together. ***Island Creek Coal Co. v. Compton***, 211 F.3d 203 (4th Cir. 2000).

This case arises within the territorial jurisdiction of the Fourth Circuit. Thus, absent contrary evidence, while evidence relevant to any of the above categories may demonstrate the existence of pneumoconiosis, the adjudicator, in the final analysis, must weigh all of the evidence together in reaching a finding as to whether a miner has established that he has pneumoconiosis. *See* ***Island Creek Coal Co.*** *supra*.

The record consists of an equal number of positive and negative readings. The Claimant alleges that one of the readings is invalid because a portable x-ray was used. A party challenging the admission of objective medical evidence must (1) specify how the evidence fails to conform to the quality standards, and (2) how this defect or omission renders the study unreliable. ***Defore v. Alabama By-Products Corp.***, 12 B.L.R. 1-27 (1988); ***Orek v. Director, OWCP.***, 10 B.L.R. 1-51 (1987). Dr. Capiello maintains that a portable x-ray does not meet the ILO classification standards for evaluating black lung. Because ILO classifications may not be used, the portable x-ray is insufficient as a means to detect and diagnose CWP.

In assessing the probative weight of the various x-ray readings, I note that all of the physicians are eminently qualified. However, there is a discrepancy in the relative level of qualifications between Dr. Cohen and Dr. Meyer as it pertains to their readings of the December 15, 2004 x-ray. Dr. Cohen's practice is internal medicine and while he is a B-reader, he is not as highly qualified as Dr. Meyer. Dr. Meyer is a B-Reader and a Board certified radiologist. Dr. Meyer also specialized in pulmonary medicine. Dr. Cohen practices internal medicine and is not a Board certified radiologist. I accord greater weight to the interpretation of Dr. Meyer on the reading of this particular x-ray. The Board held that "it takes official notice that the qualifications of a certified radiologist are at least comparable if not superior to a physician certified as a reader pursuant to 42 C.F.R. § 37.51…" ***Roberts v. Bethlehem Mines Corp.***, 8 B.L.R. 1-211, 1-213 (1985)

In weighing the x-ray evidence, I am not required to defer to the numerical superiority, ***Wilt v. Wolverine Mining Co.***, 14 B.L.R. 1-70 (1990), but it is within my discretion to do so, ***Edmiston v. F&R Coal Co.***, 14 B.L.R. 1-65 (1990), although the court disfavors "counting heads". ***Adkins v. Director, OWCP***, 958 F.2d 49, 52 (4th Cir. 1992). The positive x-rays are offset by negative readings. X-rays are not indicative of respiratory diseases that fall under the category of statutory pneumoconiosis. I see no other basis for attributing greater weight to the other individual readings.

The Claimant and Employer may also rely on well-reasoned medical reports to establish the presence or absence of pneumoconiosis. In reviewing the evidentiary record in this case, I am compelled to render the medical reports of Dr. Hippensteel and Dr. Zaldivar of little probative value on the issue of pneumoconiosis because I find there are substantial deficiencies in the reasoning and procedure by which they reach their conclusion.

Dr. Hippensteel opines that there is no evidence to suggest that the Claimant's severe respiratory ailment is due to CWP. Likewise, "industrial bronchitis" cannot be diagnosed because it subsides within a few months after leaving the mines. Dr. Hippensteel makes a distinction between various forms of bronchitis. His premise for excluding bronchitis based on

the length of time the Claimant has stopped working in the coal mines is contrary to the regulations and at odds with statutory presumptions. Dr. Hippensteel operates on the presumption that the length of time following the miner's cessation of coal mine employment determines whether pneumoconiosis is significantly related to or substantially aggravated by coal mine dust exposure. I find that the reasoning is unpersuasive and does not constitute sound analysis. Dr. Hippensteel's premise is contrary to the regulations at 20 C.F.R. § 718.201(a)(2).

In ***LaBelle Processing Co. v. Swarrow***, 72 F.3d 308 (3rd Cir. 1996), the court rejected Employer's reliance on the Surgeon General's Report in support of a finding that coal workers' pneumoconiosis does not progress in the absence of continued exposure. While the Third Circuit noted that the report states that "[s]imple (coal workers' pneumoconiosis) does not progress in the absence of further exposure," it concluded that the report "addressed only the progressive nature of clinical pneumoconiosis." In this vein, the court stated that the legal definition of pneumoconiosis is broader and includes chronic pulmonary diseases such as chronic bronchitis. With regard to chronic bronchitis, the court found "[s]ignificantly, the Surgeon General's Report discusses chronic bronchitis caused by coal dust exposure but at no point suggests that industrial chronic bronchitis cannot progress in the absence of continuing dust exposure." *See also* ***Peabody Coal Co. v. Spese***, 117 F.3d 1001 (7th Cir. 1997) (the Seventh Circuit accepted the Benefits Review Board's rejection of the Surgeon General's report as supportive of the proposition that coal workers' pneumoconiosis does not progress in the absence of continued exposure).

Similarly, both Dr. Zaldivar and Dr. Hippensteel reject the link between coal mining and asthma. Throughout his deposition, Dr. Zaldivar maintained that the Claimant suffers from asthma and that the Claimant's smoking history, particularly at a young age when the lung has yet to fully develop, is a contributing factor. Dr. Zaldivar concludes that the Claimant cannot be diagnosed with clinical or legal pneumoconiosis. Moreover, Dr. Zaldivar, when asked on cross examination whether coal mine dust could have aggravated the asthma, asserted that coal mine dust does not cause asthma. Dr Zaldivar stated that "[i]t doesn't cause asthma. There is nothing in the coal dust or silica dust or rock dust that can produce asthma or worsen the asthma." (TR1 39)[18] Likewise, Dr. Hippensteel, in his deposition, stated that "there is no association of asthma and coal mine dust...[w]e do not have coal mine dust exposure as a listed entity by any textbook that looks at occupational asthma causes and contributors, so it is not associated with coal mining." (TR2 25-26)[19]

Asthma, asthmatic bronchitis, or emphysema may fall under the regulatory definition of pneumoconiosis if they are related to coal dust exposure. ***Robinson v. Director, OWCP***, 3 B.L.R. 1-798.7 (1981); ***Tokarcic v. Consolidated Coal Co.***, 6 B.L.R. 1-666 (1983).

"COPD, if it arises out of coal mine employment, clearly is encompassed within the legal definition of pneumoconiosis, even though it is a disease apart from clinical pneumoconiosis." *See* ***also Kline v. Director, OWCP***, 877 F.2d 1175, 1178 (3rd Cir. 1989); ***Brown v. Director, OWCP***, 851 F.2d 1569 (11th Cir. 1988), app. dismissed, 864 F.2d 120 (11th Cir. 1989); ***Biggs v. Consolidation Coal Co.***, 8 B.L.R. 1-317, 1-322 (1985).

The regulations require that in order to amount to legal pneumoconiosis the diagnosed chronic pulmonary disease or respiratory or pulmonary impairment must be significantly related to, or substantially aggravated by, dust exposure in coal mine employment. An equivocal

[18] TR1 refers to the transcript of deposition of Dr. Zaldivar taken on May 30, 2006 in Charleston, West Virginia.

[19] TR2 refers to the transcript of the telephone deposition of Dr. Hippensteel on May 30, 2006.

opinion regarding etiology may be given less weight. *See* ***Justice v. Island Creek Coal Co.***, 11 B.L.R. 1-91 (1988)

Dr. Zaldivar and Dr. Hippensteel foreclose the possibility that a miner could ever establish legal pneumoconiosis when diagnosed with asthma. There is nothing in Dr. Zaldivar's or Dr. Hippensteel's statements to indicate that their conclusion regarding the etiology of asthma is solely confined to the facts of this case. Their generalized statement that coal mine dust cannot worsen asthma is hostile to the Act. The Board has held that the administrative law judge may discredit the opinion of a physician whose medical assumptions are contrary to, or in conflict with, the spirit and purposes of the Act. ***Weatherill v. Green Construction Co.***, 5 B.L.R. 1-248, 1-252 (1982). I am cognizant of the fact that both Dr. Hippensteel and Dr. Zaldivar have not eliminated the possibility that other respiratory impairments may constitute the presence of pneumoconiosis if aggravated by coal mine dust. Both doctors suggest that the miner's obstructive airways disease is associated with asthma and caused by or aggravated by the Claimant's smoking history. However, their medical opinion can be discredited because they have failed to give a legitimate reason for excluding coal mine dust as a contributor to the miner's respiratory disease. Instead, Dr. Hippensteel and Dr. Zaldivar have made a general statement completely ruling out any causal nexus between coal mine dust and asthma.

There is no dispute among the physicians that the Claimant suffers from severe obstructive lung disease. However, Dr. Hippensteel and Dr. Zaldivar attribute this to the Claimant's smoking history. Drs. Cohen and Bellam do not rule out smoking as a contributor but conclude that coal mine dust contributed significantly to the impairment, thus aggravating the condition. The x-ray evidence is in equipoise as to the presence of pneumoconiosis. Nevertheless, the establishment of pneumoconiosis is based on weighing all of the evidence together pursuant to ***Compton***.

An evaluation of the medical reports and the associated testimony of the doctors indicate that all agree that the miner suffers from a severe obstructive lung disease. The Board has held that an obstructive impairment, without a restrictive component, may be considered regulatory pneumoconiosis. ***Heavilin v. Consolidation Coal Co.***, 6 B.L.R. 1-1209 (1984). Furthermore, the legal definition of pneumoconiosis is broad and may encompass more respiratory or pulmonary conditions than those specifically, clinically diagnosed in a medical opinion. In ***Compton***, 211 F.3d 203, 210 (4th Cir. 2000), the court stated that, "[c]ritically, a medical diagnosis of no coal workers' pneumoconiosis is not equivalent to a legal finding of no pneumoconiosis." All of the physicians diagnose the Claimant with chronic obstructive disease. However, I give very little weight to the opinions of Dr. Hippensteel and Dr. Zaldivar because of their absolute statements concerning the inert qualities of coal mine dust and their belief that coal mine dust can not aggravate asthmatic conditions.

I am left with the medical opinions of Dr. Rasmussen and Dr. Bellam as well as any probative value that the x-rays may yield.

Dr Rasmussen, after reviewing all of the evidence, cites the blood-gas studies, pulmonary tests, physical examinations, chest x-rays, Dr. Hippensteel's reports, as well as the miner's medical and smoking history, in diagnosing the Claimant with pneumoconiosis. Dr. Rasmussen states that pulmonary tests verify the presence of a respiratory disease. The Board has held that pulmonary function studies are not diagnostic of the presence or absence of pneumoconiosis. ***Burke v. Director, OWCP***, 3 B.L.R. 1-410 (1981). However, Dr. Rasmussen's diagnosis is not entirely predicated on the pulmonary function tests. This is merely a subset of the entire medical record which Dr. Rasmussen uses and refers to when making the diagnosis. Dr. Rasmussen's

diagnosis is based on the fact that the miner was susceptible to toxins and the miner's exposure to coal mine dust relative to smoking, was far greater and this accounted for a significant contribution to the disease. I find Dr. Rasmussen's medical report and opinion persuasive and well-reasoned.

I note that although Dr. Rasmussen is not board certified in both internal medicine and respiratory medicine, he is "an acknowledged expert in the field of pulmonary impairments of coal miners." 1972 U.S. Code Cong. Adm. News 2305, 2314. As the Sixth Circuit Court of Appeals more recently stated, "Dr. Rasmussen's curriculum vitae establishes his extensive experience in pulmonary medicine and in the specific area of coal workers' pneumoconiosis." ***Martin v. Ligon Preparation Co.***, 400 Fed. Sup. 302 (6th Cir. 2005). See also unpublished decision in ***Bethenergy Mines, Inc. v. Director, OWCP [Rowan]***, Case No. 01-2148 (4th Cir. Sept. 4, 2002).

Dr. Bellam diagnosed the patient with pneumoconiosis and stated that the Claimant was totally disabled as a result of his respiratory impairment. After conducting several tests over the course of numerous visits, Dr. Bellam opined that the Claimant suffered pneumoconiosis arising out of coal mine dust exposure because of the length of time the Claimant was exposed to such coal mine dust. Dr. Bellam took into account the Claimant's smoking history and medical history, but did not explain why he had excluded the Claimant's smoking history as a possible factor in the respiratory ailment. The Employer argues that Dr. Bellam's report should not be given greater simply because he is the Claimant's treating physician. The Employer notes that § 718.104(d) requires satisfaction of four elements before an adjudicating officer may give special consideration to the opinion of a treating physician.[20] That is true and I do not accord his opinion controlling weight. The record does not contain sufficient evidence to determine the applicability of this section.

Nevertheless, Dr. Bellam's opinion is accorded some weight based on the medical history, the observation of symptoms consistent with pneumoconiosis, and the fact that the miner was in treatment for pneumoconiosis.

Given the medical reports, and x-rays, I find that the Claimant has successfully established, by a preponderance of the evidence, the establishment of pneumoconiosis. I have concluded that the miner has demonstrated the presence of pneumoconiosis after weighing all of the evidence together, pursuant to ***Compton***. The Claimant has proven pneumoconiosis not through any particular category of evidence, but by consideration of all of the relevant and permissible categories evidence that may be evaluated.

**Causation**

Once it is determined that the miner suffers (or suffered) from pneumoconiosis, it must be determined whether the miner's pneumoconiosis arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a) (2000) and (2001).

If a miner who is suffering from pneumoconiosis was employed for ten years or more in one or more coal mines, there is a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 C.F.R. § 718.203(b) (2001)

The miner has been credited with 16 years of coal mine employment. *See discussion on Length of Coal Mine Employment*. Because the miner has been credited with 16 years of employment, there is a rebuttable presumption that pneumoconiosis arose out of coal mine

[20] *See* 20 C.F.R. § 718.104(d) (the adjudicating officer must consider the (1) nature of the relationship, (2) duration of the relationship, (3) frequency of treatment, and (4) the extent of treatment.)

employment. The Employer has the burden to demonstrate that pneumoconiosis did not arise out of coal mine employment. I discount both Dr. Hippensteel's and Dr. Zaldivar's reports on the issue of causation. Both Dr. Hippensteel and Dr. Zaldivar state that coal mine dust cannot cause or worsen asthma, which they consider the ca\use of as sever respiratory deficit. The reports are not "reasoned" reports and are based on generalities. Given the Claimant's smoking history and length of coal mine employment, I evaluate the medical opinions and reports on the issue of causation with attention to the rationale given for excluding or including either of these factors in the development and aggravation of the Claimant's respiratory disease as well as the amount of weight that each may have contributed overall. In evaluating Dr. Hippensteel's and Dr. Zaldivar's reports, I find the reports to be unreasonable. Dr. Hippensteel and Dr. Zaldivar did not consider the miner's coal mine employment. An outright rejection of the causal nexus between coal mine dust and asthma indicates that the etiology of the miner's pneumoconiosis is a forgone conclusion with respect to coal mine employment. Neither doctor gave due consideration as to why coal mine dust was not an aggravating factor. A medical opinion based upon generalities, rather than specifically focusing upon the miner's condition, may be rejected. ***Knizer v. Bethlehem Mines Corp.***, 8 B.L.R. 1-5 (1985).

I find that the Employer has failed to rebut the presumption that pneumoconiosis arose, at least in part, from coal mine employment.

**Total Disability**

To receive black lung disability benefits under the Act, a claimant must have a total disability due to a respiratory impairment or pulmonary disease. If a coal miner suffers from complicated pneumoconiosis, there is an irrebuttable presumption of total disability. 20 C.F.R. §§ 718.204 (b) and 718.304. If that presumption does not apply, then according to the provisions of 20 C.F.R. §§ 718.204 (b) (1) and (2), in the absence of contrary evidence, total disability in a living miner's claim may be established by five methods: (i) pulmonary function tests; (ii) arterial blood-gas tests; (iii) a showing of cor pulmonale with right-sided, congestive heart failure; or (iv) a reasoned medical opinion demonstrating a coal miner, due to his pulmonary condition, is unable to return to his usual coal mine employment or engage in similar employment in the immediate area requiring similar skills, (v) lay testimony. While evaluating evidence regarding total disability, an administrative law judge must be cognizant of the fact that the total disability must be respiratory or pulmonary in nature.

In ***Beatty v. Danri Corp. & Triangle Enterprises and Dir., OWCP***, 49 F.3d 993 (3d Cir. 1995), the court stated, in order to establish total disability due to pneumoconiosis, a miner must first prove that he suffers from a respiratory impairment that is totally disabling separate and apart from other non-respiratory conditions. Mr. R.H. has not presented evidence of cor-pulmonale with right-sided congestive heart failure or complicated pneumoconiosis. As a result, Mr. R.H. must demonstrate total respiratory or pulmonary disability through the pulmonary function tests, arterial blood-gas tests, or medical opinion.

In a Living miner's claim, lay testimony cannot support the finding of a totally disabling respiratory impairment in the absence of corroborating medical evidence. ***Madden v. Gopher Mining Co.***, 21 B.L.R. 1-222 (1999).

There are three pulmonary tests submitted for evaluation. The tests were conducted by Drs. Hippensteel, Zaldivar, and Rasmussen. All three tests are qualifying based on $FEV^1$ and $FEV^1/FVC$ ratios.

There are three blood-gas studies submitted for consideration. However, two of the tests are qualifying and the third is not, with a $PCO^2$ value that is slightly higher than expected in a patient like this.

All of the experts agree that there is a severe respiratory impairment in this record. Even Dr. Zalvidar states that from a pulmonary standpoint, the Claimant is unable to perform any work above the sedentary level. Dr. Hippensteel, the other Employer expert, determined that the Claimant is precluded from any work activity.

Based on a review of all of the evidence, I find that the Claimant has established total disability through testing.

**Etiology of Total Disability**

20 C.F.R. §718.204(c) (1)(2001) Total disability due to pneumoconiosis defined. A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in Sec.718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a 'substantially contributing cause" of the miner's disability if it: (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

In ***Scott v. Mason Coal Co.***, 289 F.3d 263 (4th Cir. 2002) (citing to ***Toler v. Eastern Assoc. Coal Co.***, 43 F.3d 109 (4th Cir. 1995) and ***Grigg v. Director, OWCP***, 28 F.3d 416 (4th Cir. 1994) the court stated that an ALJ who has found that a claimant suffers from pneumoconiosis and has total respiratory disability should not credit as medical opinion that the former did not cause the latter unless the ALJ can and does identify specific and persuasive reasons for concluding that the doctor's judgment on the questions of disability causation does not rest upon her disagreement with the ALJ's findings as to either or both of the predicates in the causal chain.

Both Dr. Hippensteel and Dr. Zaldivar opined that Mr. R.H. did not have legal or medical pneumoconiosis, did not diagnose any condition aggravated by coal dust, and found no symptoms related to coal mine dust exposure. Thus, their opinions are in direct contradiction to my findings that the Claimant suffers from pneumoconiosis arising out of coal mine employment. I can only give weight to these opinions if there are specific and persuasive reasons for doing so, and these opinions can carry little weight at most. Therefore, I find that the opinions of Dr. Bellam and Dr. Rasmussen outweigh the opinions of Dr. Hippensteel and Dr. Zaldivar because the former are based on a diagnosis of coal workers' pneumoconiosis consistent with my findings.

I find that the Claimant has established total disability due to pneumoconiosis, by a preponderance of the evidence.

***CONCLUSION***

The Claimant has established each of the required elements required in order to be entitled to benefits under the Black Lung Benefits Act. *See* ***Baumgartner***; ***Mullins Coal Co.*** A determination must be made regarding the date of the commencement of benefits.

**Commencement of the Payment of Benefits**

Once it is determined that the claimant is entitled to benefits under the Act, the fact-finder must determine from what date benefit payments should begin. Benefit payments are paid in the first month in which the claimant satisfies all conditions of entitlement. 30 U.S.C. § 932(d); 20 C.F.R. § 725.203(a) (2000) and (2001).

For claims filed on or after January 1, 1974, the claimant should be paid his or her benefits beginning with the month of onset of total disability due to pneumoconiosis. 33 U.S.C. § 932(a). *See also* 20 C.F.R. § 725.503 (2000) and (2001); ***Carney v. Director, OWCP***, 11 B.L.R. 1-32 (1987). The claimant bears the burden of establishing the date of onset of total disability. *See, e,g.*, ***Johnson v. Director, OWCP***, 1 B.L.R. 1-600 (1978).

The evidentiary record contains a medical report by Dr. Hippensteel dated October 28, 2003. Dr. Hippensteel concluded that from a pulmonary standpoint the Claimant was unable to return to his previous job in the mines. No other evidence prior to this date refers to the Claimant's total disability. Dr. Hippensteel's diagnosis is based on the evidence reviewed in the record, including a current physical examination which he conducted. The diagnosis is also based on a review of tests and procedures previously performed. The onset date of disability cannot be definitely determined.

The date of this first medical evidence of record indicating total disability does not necessarily establish the onset date. Such evidence only indicates that the miner became totally disabled at some point prior to when the medical tests revealed claimant's disability. ***Tobrey v. Director, OWCP***, 7 B.L.R. 1-407, 1-409 (1984); ***Hall v. Consolidated Coal Co.***, 6 B.L.R. 1-1306, 1-1310 (1984).

If the month of onset of total disability cannot be deducted from the medical evidence of record then the claimant should be paid beginning with the month during which the claim was filed. 20 C.F.R. § 725.503(b) (2000) and (2001). *See* ***Owen v. Jewel Smokeless Coal Corp.***, 14 B.L.R. 1-47 (1990). The miner filed this claim for benefits on January 2002. Because conclusive proof is not available from the medical evidence of record. Therefore, I find the onset of total disability as beginning on January 7, 2002. (DX2)

**Augmentation of Benefits**

A claimant's award of benefits under Part C of the Act should be augmented on behalf of the following dependents who meet the conditions of relationship set out in the regulations: (1) spouse; (2) divorced spouse; or (3) child. 20 C.F.R. §725.210 (2000) and (2001). For the miner's benefits to be supplemented because of any of these relationships, the individual must qualify under both a relationship test and a dependency test.

The Employer is not contesting the issue of dependency as it concerns the Claimant's spouse. The miner and his spouse were married on June 23, 1972, in Wyoming County in West Virginia and lived with one another for at least one year. (DX9) I find that the miner has one dependant; his spouse, and that she is eligible to receive benefits based on augmentation of benefits. The miner has proven both the relationship and dependency tests.

**ORDER**

It is hereby **ORDERED** that the claim of **R.H**. be **GRANTED.**

A

DANIEL F. SOLOMON
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS**: If you are dissatisfied with the decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481. If an appeal is not timely filed with the Board, the decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).